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## PARTICIPATION AND THE LAW

Ann Seidman\*

### I. Introduction

Development constitutes the process by which society attempts to overcome mass poverty and powerlessness.<sup>1</sup> Increasingly today, world-wide, people demand increased democracy and participation in that process. Without democratic participation, regardless of their stated ideology, governments everywhere apparently respond, not to the poor and powerless, but primarily to those with power and privilege.<sup>2</sup>

Unfortunately, however, neither theoreticians nor law-makers have focused much attention on how to use law to institutionalize democracy and participation in the development process. In the broader community, some people do not even really seem to know what they mean. When asked what they meant by “democracy” many demonstrators on China’s Tiananmen Square replied: “An end to inflation.”<sup>3</sup>

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1. This definition — which I do not wish to debate here — underscores two points: 1) development does not take place unless it helps the poor and disempowered; 2) development constitutes an ongoing process, rather than attainment of a static, fixed goal.

2. This is as true in the United States (e.g. see William Chambliss and Robert B.N. Seidman, *Law, Order and Power* [Reading, MA: Addison Wesley, 1981] as in Africa (see Robert B. Seidman, *Law, State and Development* [New York: Croom-Helm, 1978] and Eastern Europe and China [see almost any issue of the New York Times, fall of 1989, spring of 1990].

3. Reported to the author by a colleague conducting translations for NBC during Tiananmen Square protests, May, 1989.

## II. Theory

Adopting a positivist epistemology that identifies values with tastes,<sup>4</sup> many political scientists claim that democracy at best constitutes the mobilization of bias.<sup>5</sup> Law merely defines the rules that determine which biases count. Yet that claim seemingly abandoned the possibility of shaping laws and institutions to engage the population in a rational participatory, democratic development process. In China, bias, not reasoned analysis, underpinned *both* the arbitrariness and violence exacted by the Cultural Revolution's call for class struggle, and the glaring inequities that emerged under the reformers' slogan, "Let some get rich first so others can get rich later." In Eastern Europe, the heady freedoms born of the demand for democracy apparently also created the environment for renewed anti-semitism and ethnic pogroms.

An alternative approach holds that the state and the legal order constitute organized society's primary instrument for attaining rational social change and development to overcome the pervasive problems of poverty and powerlessness.<sup>6</sup> Law and the state cannot, however, simply legislate the imposition of measures designed by experts and expect development to occur. Responding to the always present pressures of those with power and privilege, bureaucrats (including "experts") will likely shape development processes in their interest, ignoring the poverty and powerlessness of the majority. At the end of the day, only democratic participation can ensure that law and the state help solve poverty and powerlessness, not cause them. If democracy means merely the mobilization of bias, given the prevalence of

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4. For a statement of the implication for economics, see Milton Friedman, "The Methodology of Positive Economics" in *Essays on Positive Economics* [Chicago: University of Chicago Press, 1953], pp. 4-6.

5. E.g. Stacey and Zechausen.

6. A problem-solving approach which emphasizes the need to test the full range of possible explanations of problems to determine which seems most consistent with the evidence and hence suggests solutions more likely to attack the real underlying causes; see Denny Kalyalya, Khethiwe Mhlanga, Ann Seidman, and Joseph Semboja, *Aid and Development — Evaluating a Participatory Learning Process* [Trenton, N.J.: Africa World Press, 1988], especially Chapter 2; and Robert B. Seidman, *State, Law and Development* [New York: Crooms-Helms, 1978] on implications for law.

unreason among any population, development must remain a hopeless dream. The alternative approach holds that rational, "scientific" (in a social sense) decision-making can emerge from popular participation.

According to this alternative approach, development necessitates an ongoing learning process through which critical role occupants — in particular, the usually-excluded majority — acquire the capacity to take power and participate in the development process. This suggests that lawmakers should design laws and implementation processes that facilitate a participatory learning process. In this view, democratic participation requires the broadest involvement of those who stand to gain in an increasingly rational process of explaining and designing measures that, step by step, will help overcome the causes of pervasive poverty and powerlessness. In the process, the participants will learn more and more to employ reason, not bias, to solve the social problems.

This brief paper discusses a participatory research project that sought to test these propositions in the context of evaluating the impact of aid on the development process. The project involved some 2,000 people in 14 rural projects in the Southern African countries.

Several years ago, three lecturers from national universities, their students and I<sup>7</sup> worked together with non-government organization (NGO) intermediaries<sup>8</sup> and representatives of 14 rural development projects in Tanzania, Zambia and Zimbabwe, to conduct a participatory evaluation of aid.<sup>9</sup> We structured what we called "the learning process" around a problem-solving methodology and the explanatory categories suggested by the ROCCIPI research agenda,<sup>10</sup> originally designed to assess the reasons why role occupants disobey laws. Here, I will briefly outline the way we developed the Learning Process, and then suggest the implications of the process and its findings for attainment of a democratic, participatory law-making process for development.

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7. I was working with Oxfam America to design and implement a process for evaluating aid.

8. In-country representatives of international non-governmental organizations who conduct the day-to-day relationships with projects receiving aid.

9. The results were published in the book *Aid and Development*, *op. cit.*

10. The letters stand for Rule, Opportunity, Capacity, Communication, Interest, Process and Ideology (see Seidman, *Law, State and Development*, *op. cit.*)

### III. The Learning Process

To design the learning process in Tanzania, Zambia and Zimbabwe, the project representatives, lecturers and NGO intermediaries first met in a week-long workshop in Lusaka. There, they agreed that the evaluation aimed to explain why aid did not always attain its oft-proclaimed goals of creating self-reliant rural development projects.

In essence, the conditions under which the donors provide aid set the rules for the project members' changed behaviour, corresponding to R (rule) in ROCCIPI. The donors anticipated that, if the aid recipients did "obey" these rules, once aid ceased, they would realize self-sustainable development. The critical question remained: Why did recipients so frequently fail to behave as the donors expected?

As designed by the Lusaka workshop participants, students from each country's university, familiar with the language and culture of each project's locale, facilitated the project members' efforts to conduct the evaluation. To prepare the students for their role, the lecturers in each country first brought the students together with the country's project representatives to plan the process. The students then lived and worked in the project for six to eight weeks, helping the project members use problem-solving methodology,<sup>11</sup> encouraging them to examine evidence to test the validity of all the available explanatory hypotheses. Thus, with the students' assistance, the project members sought to: 1) identify the facts as to the nature and scope of the problems they faced; 2) determine, in light of the available evidence, which of a range of possible explanatory hypotheses best revealed the causes of the difficulties they confronted in trying to solve them; 3) assess, on the basis of their knowledge of the facts, the constraints that might hinder them, as well as the resources on which they might build successful development programs;

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11. John Dewey developed the problem-solving methodology as a basic educational approach that emphasized learning-by-doing. As an interesting historical footnote, John Dewey taught in China's universities in the early twenties, significantly influencing the founders of China's pro-democracy movement.

and 4) evaluate the role of the aid they received in light of that analysis.

To ensure that the project members considered the full range of possible explanations for the kinds of obstacles that might hinder them from successfully continuing the project after the donors terminated their aid, the students asked them to answer key questions suggested by the ROCCIPI research agenda: What Opportunity did aid really give them<sup>12</sup> to attain the necessary prerequisites for self-reliant development? To what extent did the members have the Capacity to comply with the donor's "rules" for using aid for this purpose? How had the donors Communicated to them that the aid aimed to enable them to attain self-reliant development? Did the project members' own Interests coincide with those anticipated by the aid givers? By what Process had project members become involved in carrying out the project? Did the project members' Ideology conflict with the stated aims of the project?

Following this agenda helped the project members to explore all the possible constraints (both exogenous and internal to themselves) as well as their own resources, to explain why they experienced difficulties in using aid to attain self-reliant development. On this foundation, the students then worked with the project members to figure out, logically and rationally, how they might make more effective aid in the future. This, of course, might require changes in the form and content of aid, itself, as well as their own behaviour. In the process, in other words, the project members learned not only more about the limits and possibilities of aid. They also learned to improve their own capacity to rely on their own resources, using aid only to supplement and complement their own efforts.

After completing their work with the project holders, the students, together with the relevant university lecturers and project representatives, reconvened in national workshops to evaluate the results of the learning process. Then all the project representatives, lecturers and NGO intermediaries met again in a region-wide

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12. Not as stated in the documents, but in terms of real resources.

workshop in Harare to try to generalize their conclusions as to the findings.

The Southern African Learning Process obviously did not go as smoothly as this description might suggest. Like all participatory, democratic processes, it constituted something of an experiment. At all levels, from the workshops to the field, participants engaged in the messy kinds of debates and even personal squabbles that inevitably plague “democracy” and “participatory processes” — people, working together. In the course of the sometimes confusing, sometimes contentious process, however, the participants did formulate a plan, a rational process — no matter how imperfect — on which they proceeded to work together.

#### **IV. The Findings and Their Implications for Law-Makers**

The participants in the final Harare regional workshop generally reached agreement on findings at two levels. The first level related to the general tendencies characteristic of almost all the projects. The second concerned overall validity of the learning process as a way of improving aid’s contribution to the attainment of self-reliant development. Both levels of findings have implications for institutionalization of a rational process for making and implementing laws to facilitate development.<sup>13</sup>

##### ***A. General Tendencies***

The regional workshop participants concluded that six general interrelated tendencies threatened to hinder most project members from taking full advantage of aid to attain self-reliance. Given the short space here available, I will focus on some initial observations as to their implications for law-makers.<sup>14</sup>

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13. This discussion only relates to law designed to foster development — and leaves to the other researchers the interpretation.

14. At most, these implications suggest an agenda for further research.

*(1) Misidentification of the Problem*

In setting the "rules" for the use of aid, most donors failed to involve future project members, far less their neighbours in the larger community, in an analysis of their problems and the formulation of plans for overcoming them. As a result, many projects had only a peripheral impact. When the aid ended, they tended to leave the project members and the larger community no better equipped than in the past to improve the quality of their lives. This argues that lawmakers should involve those whom they anticipate will gain in a rational problem-solving process to identify the problems they expect new laws to solve.

*(2) Dangers of Elitism*

With more education and greater access to resources than the average members, most project leaders tended to emerge as elites. Frequently, this engendered suspicions of corruption. Whether or not the suspicions reflected fact, they inhibited member cooperation. Only when project members acquired increased cooperative control over the aid resources, including the capacity to call their leaders to account, could they overcome this tendency. For lawmakers, this suggests the necessity to ensure that implementing agencies enable, not only community leaders, but all community members to acquire access to the resources and the skills needed to behave in compliance with proposed new laws. In particular, it requires formulation of "working rules" that ensure public debate and leadership accountability.

*(3) Local Government Resistance*

Local government officials frequently viewed as competitors' projects that received aid from sources outside their control. They sometimes refused to assist and even blocked project members' development efforts. Project members seem best able to overcome this tendency by acquainting local government officials with their activities and winning their support. In some cases, the project members themselves won elections to local government posts.



Lawmakers and implementors, likewise, need to inform, educate and, whenever possible, enlist the support of local government officials to assist — rather than block — community members' efforts by providing community resources to help them comply with new laws. This may require new local "working rules" that facilitate community participation in local government, not only through regular democratic elections, but also through public hearings and other devices to ensure government accountability.

#### *(4) Ignorance of Existing Constraints and Resources*

Donor agencies' policies and requirements not infrequently rendered project members more, rather than less, dependent on outside assistance because they failed to understand the limits — as well as the possibilities — imposed by project members' capacities, interests and ideologies. Only when the aid programmes began with the members' own realistic assessments of their own needs and capacities would the members likely continue those programmes after the donors terminated the aid. This implies that lawmakers and implementors should involve proposed beneficiaries of proposed new development-oriented laws in a problem-solving process for determining what resources and educational components they initially require to comply, and in an ongoing evaluation process to assess and improve their role as they improve their resources and skills.

#### *(5) Inadequate National Policies*

Inadequate national development policies — which by the 1980s in most of Southern Africa had culminated in crisis — frequently created conditions that undermined the continued success of small aid projects. To overcome this tendency required that project participants, from the outset, had to engage in studying the possible implications of changing national and even international events. This helped them initially to design their projects to reduce external events' possible negative impact. In the longer run, it enabled them to participate more effectively in helping to shape national policies more likely to facilitate their local projects' success. This suggests that, recognizing

that national and even international events inevitably affect the potential success of laws directed at particular problems, lawmakers need to institutionalize an ongoing educational process to increase broader public understanding of and participation in creating more appropriate national policies.

#### *(6) Discrimination Against Women*

In almost every project, institutionalized discriminatory attitudes and practices aggravated the impact of the above tendencies in disadvantaging women participants. This rendered it particularly difficult for women to participate in and contribute fully to self-reliant development. To surmount this tendency not only required institutionalized measures to end discriminatory practices, it also necessitated ongoing education to alter the traditional ideologies of members of the projects and the surrounding community to convince them, in their own interest, to support affirmative action to protect and advance the role of women in the development process. For lawmakers and implementors, this implies not only the necessity to bar practices that discriminate against women, but also to consider the nature and kinds of educational programmes required to help community members, in their own interests, to change the deep-seated ideologies that perpetuate them.

#### *B. The Necessity of Institutionalizing Participatory Evaluation*

The second level of the Southern African Learning Process findings suggested that involving project members in evaluating aid's contribution to their projects significantly improved their ability to overcome the six tendencies that hindered their attainment of self-reliant development. As emphasized at the outset, development constitutes an ongoing process. Once implemented, no matter how solidly grounded, solutions inevitably encounter new problems as existing resources and constraints change — with or without conscious efforts incurred by implementing the proposed solution.

To the extent that the project members and even the larger community engaged in identifying the problems which aid programmes sought to help them overcome, they and other community members, including local state officials, had greater interest in its success. If a group of women sewed school uniforms to meet a real need in the community, as well as to increase their own incomes, they would more likely succeed and even receive local government assistance. To the extent that project members participated in designing the aid programme, they could incorporate in it the features necessary to improve their capacity to succeed, as well as their interest in implementing it. If the membership's lack of ability to understand their project's books hindered their ability (and their confidence in that ability) to monitor their leaders financial practices, they themselves might propose educational measures to help them acquire the needed skills. Once they concluded, through their own analysis, that national and even international events might hinder their success, project members initiated efforts to create and participate more effectively in democratic processes at least to improve national policies. Because their own evaluation proved that exclusion of women from the design and implementation of their projects hindered their success, project members — male and female — began to change their perceptions of women's role and to involve them more fully from the outset.

In short, an ongoing evaluation process provides an early warning system that enables participants to change their behaviour to take account of ongoing changes. It also provides them a valuable learning process to strengthen their capacity for more self-reliant development efforts in all aspects of their lives. Participatory evaluation turned out to be a prime ingredient of any process designed to empower the poor majority.

The Southern African Learning Process suggested that, to have that effect, the evaluation process cannot succeed by simply offering participants a grouch session, a coffee klatch for the disgruntled. It requires an agenda of steps, a rational organization of investigation of evidence relating to problems, their causes, and the range of possible solutions.

The second level of findings, too, has implications for lawmakers and implementors. It underscores the potential benefits of

accompanying every proposed law by measures to ensure that all those affected engage in an ongoing evaluation process. This implies the necessity for laws encouraging the organization of all kinds of social groups — women, youth, wage earners, informal sector workers, professionals, academics — and institutionalizing opportunities for them to express their comments and criticisms relating to the implementation of relevant laws. One-time-only hearings on proposed laws will not serve this purpose.

Furthermore, for the evaluation to remain constructive suggests that the process should incorporate guidelines. It should require that critics explicate and provide evidence to support their explanations as the foundation for their concrete proposals for solution of what they see as difficulties.

## **V. Summary and Conclusion**

Throughout the world today growing numbers of people demand democracy and participation, but the concepts, as far as they concern lawmaking and implementation, remain vague. The notion that laws merely should provide the rules for the game of mobilizing bias contains inherent dangers to society's stability and well-being. A growing body of evidence — of which this paper only briefly describes a fragment — suggests that lawmakers could contribute far more by institutionalizing a rational participation process of formulating, implementing, and evaluating new laws and their consequences.

